

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDDIE JOE BUSH,

Plaintiff,

v.

WASHINGTON STATE
DEPARTMENT OF
CORRECTIONS,

Defendants.

NO. CV-08-5063-RHW

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS; GRANTING LEAVE
TO AMEND**

Before the Court is Defendant's Motion to Dismiss (Ct. Rec. 6). The motion was heard without oral argument.

I. Background

Pro se Plaintiff was a prisoner at the Washington State Penitentiary in Walla Walla County, where he served a 200-month sentence for a 1995 conviction that expired on November 5, 2005. Following this conviction, Plaintiff served consecutively a ten-month conviction that began November 5, 2005, and was set to expire June 10, 2006. There was some discrepancy as to the exact end date of the convictions, and a state official of the Department of Corrections recalculated Plaintiff's final release date to extend his incarceration by multiple years. Plaintiff filed a personal restraint petition arguing that the recalculation to extend the end date for an additional four to six years was incorrect and resulted in unlawful imprisonment. The Washington State Supreme Court affirmed the end date of June 10, 2006, causing his release on December 22, 2008.

Plaintiff filed his civil Complaint on September 8, 2008, alleging that

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1 Defendant violated his constitutional right to liberty, and his constitutional
2 protections against illegal seizures and double jeopardy (Ct. Rec. 1.) Defendants
3 now move to dismiss, arguing that Plaintiff's Complaint should be dismissed
4 because (1) Defendant enjoys sovereign immunity under the Eleventh Amendment
5 of the United States Constitution; (2) the Court lacks personal jurisdiction over
6 Washington Department of Corrections; (3) Plaintiff did not properly serve the
7 Summons and Complaint on Defendant; and (4) Plaintiff's complaint fails to state
8 a claim upon which relief may be granted because the Department of Corrections is
9 not a "person" under 42 U.S.C. § 1983. (Ct. Rec. 6.)

10 **II. Standard of Review**

11 The purpose of rule 12(b)(6) is to test the sufficiency of the statement of a
12 claim showing that plaintiff is entitled to relief, without forcing defendant to be
13 subjected to discovery. *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir.
14 1993). A motion to dismiss does not involve evaluating the substantive merits of
15 the claim. *Id.* Indeed, "The issue is not whether a plaintiff will ultimately prevail,
16 but whether the claimant is entitled to offer evidence to support the claims." *Diaz v.*
17 *Int'l Longshore and Warehouse Union*, 474 F.3d 1202, 1205 (9th Cir. 2007)
18 (citations omitted).

19 The standard is viewed liberally in favor of plaintiffs. *Cervantes*, 5 F.3d. at
20 1275. Read in conjunction with Fed. R. Civ. P. 8(a), the complaint should not be
21 dismissed unless plaintiff fails to state an adequate "short and plain statement of the
22 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A
23 complaint need only satisfy the Rule 8(a) notice pleading standards to survive a
24 Rule 12(b)(6) dismissal. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,
25 1104 (9th Cir. 2008) (citations omitted). The complaint need not contain detailed
26 factual allegations, but it must provide more than "a formulaic recitation of the
27 elements of a cause of action." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 127
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1 S.Ct. 1955, 1965 (2007)).

2 In ruling on a Rule 12(b)(6) motion, the court must evaluate whether, in the
3 light most favorable to the pleader, resolving all discrepancies in the favor of the
4 pleader, and drawing all reasonable inferences in favor of the pleader, the actual
5 allegations asserted raise a right to relief above the speculative level. *Id.* In short,
6 the complaint must provide “plausible” grounds for recovery on its face. *Id.*
7 Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a
8 cognizable legal theory or sufficient facts to support a cognizable legal theory.
9 *Mendonado*, 521 F.3d at 1104.

10 Moreover, Rule 12(b)(6) motions are viewed with disfavor. *Broam v.*
11 *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). “Dismissal without leave to amend is
12 proper only in ‘extraordinary’ cases.” *Id.*

13 **III. Discussion**

14 Defendant argues that this case should be dismissed based on the Eleventh
15 Amendment’s grant of sovereign immunity. The Court agrees.

16 Whether a state is immune from suit under the Eleventh Amendment is a
17 question of law. *Micomonaco v. State of Wash.*, 45 F.3d 316, 319 (9th Cir. 1995).
18 The Eleventh Amendment provides: “The judicial power of the United States shall
19 not be construed to extend to any suit in law or equity, commenced or prosecuted
20 against one of the United States by Citizens of another State, or by Citizens or
21 Subjects of any Foreign State.” U.S. Const. Amend. XI. Although the amendment
22 does not by its terms prohibit an action against a state by one of the state’s own
23 citizens, the Supreme Court has recognized such a prohibition. *See Welch v. State*
24 *Dep’t of Highways & Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 2945, 97
25 L.Ed.2d 389 (1987) (plurality) (*citing Hans v. Louisiana*, 134 U.S. 1, 10, 10 S.Ct.
26 504, 505, 33 L.Ed. 842 (1890)).

27 The Department of Corrections is an arm of the state and therefore immune
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1 from suit. *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (stating that “the
 2 Eleventh Amendment will bar Pena from bringing his claims in federal court
 3 against the [Washington] state officials in their official capacities . . . It will not,
 4 however, bar claims against the state officials in their personal capacities”). *Accord*
 5 *Hale v. State of Ariz.*, 993 F.2d 1387, 1400 (9th Cir. 1993) (finding that the Arizona
 6 Department of Corrections was not a person under Section 1983 because it is not an
 7 arm of the state). Since Plaintiff sued the State Department of Corrections in its
 8 official capacity only, this case must be dismissed under the Eleventh Amendment.¹

9 Plaintiff may be accorded leave to amend where justice so requires. Fed. R.
 10 Civ. P. 15(a)(2). Because Plaintiff is proceeding *pro se* and *in forma pauperis*, the
 11 Court will grant him an opportunity to amend his complaint. Plaintiff may submit
 12 an Amended Complaint within **thirty (30) days** of the date of this Order. The
 13 Amended Complaint will operate as a complete substitute for (rather than a mere
 14 supplement to) any prior complaint. The Second Amended Complaint must be
 15 clearly labeled as “Amended Complaint” and cause number CV-08-5063-RHW
 16 must be written in the caption.

17 **PLAINTIFF IS CAUTIONED IF HE FAILS TO AMEND WITHIN 30**
 18 **DAYS AS DIRECTED, THE COURT WILL DISMISS THE COMPLAINT**
 19 **FOR FAILURE TO STATE A CLAIM.**

20 Accordingly, **IT IS HEREBY ORDERED:**

21 1. Defendant’s Motion to Dismiss (Ct. Rec. 6) is **GRANTED**.

22 2. Plaintiff is given leave to amend his complaint. Plaintiff shall file his
 23 amended complaint within 30 days from the date of this order. Failure to do so
 24 could result in this case being dismissed with prejudice.

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 27 ¹Whether a state official sued in his or her individual capacity would be
 28 immune from suit is a separate issue.

1 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
2 Order and forward copies to Plaintiff and counsel.

3 **DATED** this 20th day of November, 2008.

4 *S/ Robert H. Whaley*

5 **ROBERT H. WHALEY**
6 Chief United States District Judge

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